2016 Canadian Maritime Law Cases

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1. J.D. Irving Limited v. Siemens Canada Limited[1]

Limitation of Liability – Onus of Proof - Whether precise cause of the loss needs to be proven

Précis: The right of a ship owner to limit liability for damage to cargo when a barge capsized was upheld.

Facts: Siemens entered into a contract with Irving for Irving to transport heavy cargo. To effect the transport Irving chartered a barge and a tug and retained a marine consultant ("MMC") to provide architectural and consulting services. While in the process of loading, a piebce of the cargo loaded on a transporter fell off the barge and into the harbour at Saint John, New Brunswick. Siemens commenced various proceedings in the Ontario Superior Court (for $45 million) against Irving and its various subcontractors. Irving commenced this proceeding in the Federal Court for a declaration that it was entitled to limit its liability to $500,000 under the *Marine Liability Act*[2] and the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 (collectively, *the "Limitation Convention").*

Decision: Irving is entitled to limit its liability.

Held: Siemens argues that Irving and its subcontractors are not entitled to limit their liability as they acted recklessly and with knowledge that the loss of the cargo would probably result, within the meaning of Art. IV of the Limitation Convention. In essence, Siemens argues that Irving knew the barge was too small and was unsuitable to transport the cargo. It further argues that during loading the transporter on which the cargo was loaded veered off the centreline which was not marked and that Irving "knowingly deviated from the load plan in critical respects with knowledge of the consequences". The evidence establishes that the barge used was, in fact, suitable for the intended move. Further, although the stability calculations and load plan prepared by MMC assumed a divided aft peak ballast tank, based on the expert evidence, this did not render the barge unstable or unsuitable for the planned load-out and voyage. The capsize was due to a number of contributing factors, each of which alone had a minimal effect. The contributing factors included: the cargo was loaded slightly off centre; the aft peak tank was unsealed which reduced the GM of the barge; and, hydraulic manipulation of the transporter decks which raised the centre of gravity. Some combination of these and possibly other factors caused the loss.

There is a presumptive right to limit liability and a very high burden on the party seeking to break limitation to establish that the loss resulted from: (i) the personal act or omission of the

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[1] 2016 FC 69
[2] SC 2001, c. 6

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person seeking to limit liability, (ii) committed recklessly and, (iii) with knowledge, (iv) that such loss, (v) would probably result. "The contracting states to the Limitation Convention intended the fault requirement to be high resulting in a virtually unbreakable right to limit liability". The evidence presented does not establish that Irving or its subcontractors acted recklessly and with knowledge that the loss would probably result. They did not know that the combination of factors outlined above would probably result in the loss of the cargo. They took steps to ensure the safe loading of the cargo. Siemens argues that recklessness and knowledge should be inferred from the fact that Irving cannot establish the precise cause of the loss and relies upon cases decided under the Warsaw Convention relating to the carriage of goods by air. The air carriage cases are distinguishable. Here, Irving presented a wealth of direct evidence regarding the circumstances of the loss and it is not appropriate to infer recklessness and knowledge. Article IV of the Limitation Convention requires actual conscious knowledge. It has not been established that Irving and its subcontractors had subjective knowledge that the loss would probably result from their acts or omissions. Accordingly, Irving is entitled to limit its liability.

Comment: This case is notable for its comments with respect to the very high burden upon a person attempting to break limitation, noting that it is a virtually unbreakable limitation.

2. J.D. Irving Limited v. Siemens Canada Limited[3]

Limitation of Liability - Persons Entitled to Limit – Independent Contractors

Précis: Independent contractors of the ship owner are not entitled to limit liability pursuant to the provisions of the LLMC convention.

Facts: Irving contracted with Siemens to transport cargo by tug and barge. During the loading of the cargo at Saint John, New Brunswick, the cargo fell off the barge. MMC provided naval architectural and consulting services to Irving in relation to the loading and transport of the cargo pursuant to a contract between it and Irving. The actual services were provided by Mr. Bremner who was the owner and principal of MMC. In a decision reported at 2016 FC 69, the Federal Court held that Irving had the right to limit its liability but deferred any decision on the limitation rights of MMC and Bremner. This application was by MMC and Bremner for a determination of their rights to limit liability pursuant to the *Marine Liability Act*[4] and Art. 1(4) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 (collectively, the "Limitation Convention").

Decision: MMC and Bremner are not entitled to limit their liability.

Held: Art. 1(4) of the Limitation Convention extends the right to limit liability to "any person for whose act, neglect or default the shipowner or salvor is responsible". MMC and Bremner argue that Art. 1(4) extends the right to limit to subcontractors of the shipowner provided the shipowner is responsible at law for the actions of the independent contractor. MMC and Bremner rely upon the non-delegable obligation of a shipowner to provide a seaworthy vessel and assert that an independent contractor who renders a ship unseaworthy saddles the shipowner with liability. Thus, they say they are persons for whom Irving is responsible within

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[3] 2016 FC 287
[4] SC 2001, c. 6

the meaning of the Limitation Convention. However, a contractual relationship between two independent entities does not give rise to vicarious liability unlike the relationship between employer and employee or principal and agent. Moreover, Bremner was not an employee or agent of Irving but of MMC. The text writers acknowledge that Art. 1(4) could be interpreted broadly or narrowly. Some suggest it could be interpreted to apply to independent contractors whereas others disagree. The Travaux Préparatoires suggests that it was not intended to extend the right to limit liability to independent contractors. Accordingly, given it was not intended to extend the right to limit to subcontractors and given that the contractual relationship between Irving and MMC did not attract vicarious liability, MMC and Bremner are not entitled to limit their liability.

Comment: This case is very notable as it is believed to be the only case that has directly considered and ruled on this issue.

3. Marcoux v. St-Charles-de-Bellechasse (Municipalité de)[5]

Constitutional Law – Ancillary Powers Doctrine - Validity of Municipal By-law restricting motor boats on lake

Précis: A municipal bylaw restricting the types of vessels that could be operated on a lake was held to be invalid.

Facts: The appellants were convicted of violating a municipal by-law that prohibited the use of certain watercraft on a lake. The appellants challenged the constitutional validity of the by-law on the grounds that it concerned navigation and shipping, a federal power under the *Constitution Act*[6]. The municipality justified the by-law on the basis that it was part of a multifaceted strategy to protect the environment and was therefore valid under the ancillary powers doctrine. At first instance, the trial judge agreed with the municipality and held the by-law to be valid. The appellants appealed.

Decision: The appeal is allowed and the appellants are acquitted.

Held: The protection of the environment is a shared jurisdiction between the provinces and Federal Government. Both levels of government should take a cooperative and coordinated approach to such matters. The legal analysis should be undertaken with these considerations in mind. The first part of the analysis is to identify the pith and substance, the primary purpose or dominant characteristic, of the impugned legislation. Once the matter has been classified the second step is to classify it under one of the heads of power in the *Constitution Act*.

The municipality admits that the pith and substance of the by-law is navigation which is within federal jurisdiction but says it is saved by the ancillary powers doctrine. The ancillary powers doctrine recognizes that a degree of jurisdictional overlap is inevitable. Under the doctrine an otherwise invalid law can be saved "where it is an important part of a broader legislative scheme that is within the jurisdiction of the enacting level of government". However, the

[5] 2015 CanLII 59742 (QSC)
[6] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

municipality has not proven the existence of a complex regulatory scheme which would permit the application of the doctrine. Moreover, the seriousness of the intrusion of the impugned measure must be assessed relative to its degree of integration in the scheme. A serious intrusion requires a high degree of integration. The by-law here is a serious intrusion into the federal power over navigation and shipping and, if such intrusion was allowed, would have the effect of eviscerating the federal power. The by-law is therefore invalid and not saved by the ancillary powers doctrine. Additionally, the interjurisdictional immunity doctrine applies and the by-law is inapplicable. Control of navigation on lakes is at the core of the federal power over navigation. Finally, if the by-law was valid and applicable, it would deprive the federal government of its power to decide navigational restrictions under the *Vessel Operation Restriction Regulations*[7]. This would be an operational conflict giving rise to the paramountcy doctrine and rendering the by-law inoperative.

4. Lakeland Bank v. The Ship NEVER E NUFF[8]

Mortgage - Innocent Purchaser - Validity of Foreign Mortgage - Limitation Period Applicable - Application of Provincial Laws

Précis: The Federal Court gave judgment *in rem* in favour of a U.S. mortgagee notwithstanding the sale of the vessel to an innocent purchaser. Provincial laws requiring registration of a mortgage have no application in the circumstances.

Facts: The plaintiff loaned funds to the first defendant in 2007 for the purchase of a vessel and registered a mortgage against the vessel in the United States, the location of the vessel at the time. The first defendant defaulted on the loan and the plaintiff obtained an *in personam* judgment against him in the United States. The plaintiff was, however, unable to obtain an *in rem* judgment against the vessel as it had been moved to Canada and resold to the second defendant. The plaintiff learned of the sale in January 2009. In June 2012, the plaintiff brought this proceeding in the Federal Court of Canada *in personam* against the first and second defendants and *in rem* against the vessel. The court dismissed the *in personam* claim against the first defendant on the grounds that the Statement of Claim was never served on him and, in any event, the issue of his liability was *res judicata*. The court also dismissed the *in personam* claim against the second defendant as he was merely an innocent purchaser for value without notice of the mortgage. The remaining issue was the *in rem* claim and the validity of the mortgage.

Decision: Judgment for the plaintiff on the action *in rem*.

Held: The *in rem* action against the vessel was vigorously defended by the second defendant who argued, first, that the plaintiff had failed to prove the mortgage was valid under American law. However, the plaintiff was not required to present evidence of American law because it was not asserting any greater rights under American law than under Canadian law. With no evidence of American law, Canadian law is presumed to apply. The mortgage was valid under Canadian law and lack of registration is of no effect.

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[7] SOR 2008-120

[8] 2016 FC 1096

The second defendant next says the claim is subject to a three-year limitation period under either American law or pursuant to s. 140 of the *Marine Liability Act*[9]. The plaintiff has not led proper evidence of a three-year limitation period under American law and fails on this account. With respect to the three-year limitation period contained in s. 140 of the *Marine Liability Act,* this limitation period does not apply since it was only enacted in September 2009 and does not have retroactive effect. In the Federal Court limitation/prescription periods are matters of procedure governed by the *lex fori*, except perhaps with respect to matters arising wholly within Quebec. The applicable limitation period is six years under s. 39(2) of the *Federal Courts Act*[10]. The Statement of Claim was filed in June 2012, within six years of the plaintiff becoming aware of the sale.

Finally, it is argued that under Quebec law the mortgage is invalid since it was not registered as required by the Quebec *Civil Code*[11]. If this was purely a Quebec matter, the mortgage could have been registered under the *Civil Code* and enforced in the Federal Court. It does not, however, follow that failure to register renders the mortgage unenforceable. This is a constitutional issue that must be considered in light of *Ordon v Grail*, [1993] 3 SCR 437, as modified by *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44. They set out four factors to consider, each of which are addressed below.

(1) Is a mortgage on a ship a matter within exclusive federal competence under the navigation and shipping power?

Although contracts of sale and insurance are within provincial competence as being matters of property and civil rights, the sale of a ship and marine insurance are also matters of navigation and shipping and form part of Canadian maritime law. Mortgages on maritime property clearly fall within Canadian maritime law and are subject to federal jurisdiction.

(2) Is there a federal statutory counterpart to the provisions of the Quebec *Civil Code*?

It is not necessary to determine if there is a federal statutory counterpart to the provisions of the Quebec *Civil Code* in this matter as the *Canada Shipping Act 2001*[12] would not have applied to an American ship and an American mortgage.

(3) If there is no federal statutory counterpart, should non-statutory Canadian maritime law be altered?

Canadian maritime law need not be altered as it currently recognizes unregistered mortgages.

(4) If the non-statutory Canadian maritime law should not be changed, does the provincial law trench upon a protected core of federal competence?

The provincial law in this case does trench upon a protected core of federal competence. This is not a case such as *Ryan Estate* where it was noted provincial workers' compensation laws had

[9] SC 2001, c. 6
[10] RSC 1985, c. F-7
[11] CQLR c. CCQ-1991
[12] SC 2001, c. 26

applied to maritime matters for more than a century. Here, in the case of conflict, federal law is paramount.

Comment: The learned Judge appears to conflate the constitutional doctrines of interjurisdictional immunity and paramountcy. On the one hand, he discusses trenching upon the protected core of federal competence which is the language of interjurisdictional immunity. On the other hand, he says that the federal law is paramount, which is the language of paramountcy. It is therefore unclear which doctrine was ultimately relied upon to reach the decision that federal law applied. Moreover, to the extent that the Judge relied on the doctrine of paramountcy, he appears to have applied the doctrine to non-statutory Canadian maritime law which is, in essence, the common law. However, in *Marine Services International Ltd. v Ryan Estate*, 2013 SCC 44, the Supreme Court of Canada said that the paramountcy doctrine does not apply to an inconsistency between the common law and a valid provincial enactment.

5. AGF Steel Inc. v. Miller Shipping Limited[13]

Carriage of Goods - Is Transportation Services Contract a Charter? - Application of Hague-Visby Rules - Agreements to insure

Précis: The court held that a transportation services contract between the parties was, in fact, a contract for the charter of a ship and the Hague-Visby Rules did not apply.

Facts: The plaintiff and the defendant, Miller Shipping ("Miller"), entered into a contract for the transportation of 43,000 metric tonnes of steel rebar over 8 voyages by tug and barge. The contract was called a "Time Charter Party", identified the plaintiff as "charterer" and referred to "Employment of the Vessel" and "Hire". The contract contained a so-called "knock for knock" clause stipulating, *inter alia*, that each party would be liable for all losses, costs, damages and expenses incurred by the party on account of loss of or damage to its property. The contract also contained insurance clauses requiring the plaintiff to obtain cargo insurance and Miller to obtain Hull and Machinery insurance and protection and indemnity insurance. The first two voyages were completed without incident. During the third voyage on 10 May 2013 the barge capsized with the loss of the entire cargo. The plaintiff commenced suit for the value of the lost cargo (in excess of $8 million) against Miller and its various subcontractors including the actual owner of the tug and barge and the surveyor that surveyed and approved the stowage of the barge. Miller brought this summary judgment application for a declaration that it was not liable. The plaintiff opposed the application.

Decision: The application is allowed, in part.

Held: The test on a summary judgment application is that there is no genuine issue for trial. The onus is high and is on the party bringing the application. Summary judgment should be granted only in the clearest of cases.

Miller argues that the contract between the parties is a charterparty and that the contract excludes the liability of Miller and the other defendants. The plaintiff, on the other hand, argues that the contract is one for the carriage of goods by water, that the Hague-Visby Rules apply,

[13] 2016 FC 461

that any exclusion or limitation clauses in the contract are rendered invalid by article III, r.8 of those rules and that, in any event, on a proper interpretation, the contract does not exclude the liability of Miller and the other defendants. Thus, there are two issues: first, is the contract governed by the Hague Visby Rules; and, second, if the contract is not governed by the Hague Visby Rules, do the "knock for knock" and insurance clauses exclude the liability of Miller and the other defendants.

The nature of the contract between the parties is a discrete issue that is capable of being determined by summary judgment as the principal evidence required to assess its nature is the contract itself. The contract is entitled "Time Charter Party", describes the plaintiff as "charterer" and refers to "Employment of the Vessel" and to "Hire". This is sufficient to find the contract is a charterparty and not covered by the Hague-Visby Rules. Accordingly, the parties were free to negotiate their own terms concerning liability. However, the contractual interpretation of the "knock for Knock" and insurance clauses is an issue of mixed fact and law which is not appropriate for summary judgment. These issues will proceed to trial.

6. Re: Hanjin Shipping Co. Ltd.[14]

Hanjin Bankruptcy – Recognition of Foreign Insolvency Proceedings – Stays of Federal Court Proceedings

Précis: The automatic stay of proceedings that arises upon recognition of a foreign insolvency proceeding does not automatically include existing Federal Court *in rem* proceedings.

Facts: Following well publicized financial difficulties, Hanjin Shipping obtained a creditor protection order from Korean courts under the *Debtor Rehabilitation and Bankruptcy Act* of Korea. The Trustee of Hanjin then made this application to the British Columbia Supreme Court under the *Companies' Creditors Arrangement Act*[15] for recognition of the Korean proceeding as the main proceeding and for a stay of any proceedings as against Hanjin and its property. At the time of the application, there were several proceedings already commenced against Hanjin in the Federal Court and at least two vessels that had been operated by Hanjin had been arrested in those Federal Court proceedings.

Decision: Application allowed, except in respect of the Federal Court proceedings.

Held: The contentious issues relate to the Federal Court proceedings. "In recognition that *in rem* proceedings are before the Federal Court in respect of the vessels, *Hanjin Vienna*, *Hanjin Scarlet*, and *Hanjin Marine*, this order shall not apply to those proceedings (including caveators) unless and to the extent the Federal Court of Canada may determine in the exercise of its own unfettered jurisdiction and discretion."

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[14] 2016 BCSC 2213
[15] RSC 1985, c. C-36

7. Offshore Interiors Inc. v. Worldspan Marine Inc.[16]

Ship Building – Contractual Dispute- Priorities

Précis: The Federal Court will not require parties to litigate issues in another court. The priorities as between the builder and purchaser/mortgagee depend on the wording of the contractual documents.

Facts: Worldspan and Sargeant entered into a vessel construction agreement ("VCA") for the construction of a yacht by Worldspan for Sargeant. Disputes arose during the course of construction which resulted in the vessel being arrested by Offshore, an unpaid supplier of materials and services. Various claims were filed against the vessel including claims by Sargeant and Worldspan. Sargeant claimed $20 million based on a builder's mortgage granted to it by Worldspan to secure the advances made by Sargeant to Worldspan towards the construction of the vessel. Worldspan claimed $5 million in respect of amounts alleged to be due and owing to it by Sargeant and which it further alleged were secured by the VCA with a priority above the builder's mortgage. The vessel was eventually sold by the Federal Court for $5 million, leaving a substantial shortfall. Meanwhile, a petition under the *Companies Creditors' Arrangement Act*[17] was filed by Worldspan and suits and countersuits were filed by Worldspan and Sargeant in the British Columbia Supreme Court.

At first instance (2016 FC 27), there were two motions before the Federal Court, one by Sargeant and another by Worldspan, both of which were dismissed. The motion by Sargeant was for an order that the *in personam* claims between it and Worldspan must proceed in the British Columbia Supreme Court leaving only the *in rem* claims to be addressed in the Federal Court. This motion was dismissed by the motions Judge on the grounds that Sargeant chose the Federal Court to adjudicate its *in rem* claims and that this must include the ability to address the underlying *in personam* liability. The motion by Worldspan was for an order that its claim for unpaid advances had priority over the builder's mortgage claims. The motions Judge reviewed the various contract documents including section 12.1 of the VCA which provided that Sargeant's first priority for advances was subordinate to "Builder's right to receive payments pursuant to this Agreement". Although Worldspan argued that this section created a condition that it be paid in full before Sargeant could exercise its mortgage security, the motions Judge held that this section merely gave Worldspan the right to deduct any amounts owed from the mortgage claim.

Worldspan appealed the dismissal of its motion.

Decision: Appeal dismissed.

Held: Although the appellant laid out a contractual interpretation that would support its appeal, the motions Judge adopted an equally plausible construction. There was evidence to support the construction adopted by the motions Judge and, therefore, there was no palpable and overriding error.

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[16] 2016 FCA 307

[17] RSC 1985, c. C-36

8. Ballantrae Holdings Inc. v. The Ship Phoenix Sun[18]

Priorities - Ranking - Equity - PPSA

Précis: This case deals with priorities as between various claimants and addresses the relevance of provincial personal property security legislation to maritime claims and priorities.

Facts: The "Phoenix Sun" was purchased while under arrest by a person who intended to repair her, find a cargo and sail her to Turkey where she would be sold for scrap at a profit. The ship was purchased for $1 million which was borrowed from the plaintiff, Ballantrae, and secured by a mortgage on the ship. The mortgage was never registered in a ship registry but it was registered as a charge under the Ontario *Personal Property Security Act*[19] ("PPSA"). The purchaser hired a crew and persuaded other chandlers and repairers to provide goods and services to the vessel. The purchaser also obtained some additional funds from a Mr. Hamilton. Eventually, the funds ran out and the ship was again arrested in this proceeding commenced by Ballantrae. The ship was subsequently sold for $680,000. Pursuant to the normal procedure established by the Federal Court, claimants to the proceeds of sale filed their claims with the court. The court was called upon to adjudge and rank the claims. The claimants and claims included:

- The Marshall for the fees and expenses of bringing the ship to sale;
- Ballantrae for its costs of bringing the vessel to sale;
- The Master and crew of the vessel for the amounts due to them under their employment contracts;
- The City of Sorel for berthage and the costs of supplying electricity, which it claimed had a priority under either the *Canada Marine Act*[20], the *Marine Liability Act*[21] or in equity;
- Various necessaries supplier who claimed lien rights under s. 139 of the *Marine Liability Act*;
- Mr. Hamilton, who also claimed lien rights under s. 139 of the *Marine Liability Act* or in equity;
- Ballantrae for the amount due under the mortgage; and
- Skylane, who also claimed to have a valid mortgage registered in Panama.

Decision: The claims will rank in accordance with the reasons.

Held: Generally, the highest priority claims are the Marshall's fees and expenses and the costs of the creditor that brought the ship to sale. Thereafter come maritime liens and liens created

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[18] 2016 FC 570
[19] RSO 1990, c. P.10
[20] SC 1998, c. 10
[21] SC 2001, c. 6

by statute, which enjoy the same status. Next in ranking are mortgages followed by *in rem* creditors. On occasion, when the interests of justice require, this traditional ranking may be altered.

The Marshall's claim for expenses ($39,000) is the claim with the highest priority. Ranking second is the claim of the plaintiff, Ballantrae, for the costs incurred to bring the ship to sale. These costs are not the actual solicitor client costs but are to be taxed under the tariff. Also, this priority is limited to the costs associated with bringing the ship to sale. It does not include the costs of asserting its own claim or contesting the claims of other parties.

Ranking next are the claims of the Master and crew for wages and benefits. These are alleged to be $180,000. However, the claim is calculated using an exchange rate at the date of judgment and includes a retainer or stand-by fee of one third of one month's wages. The exchange rate to be used is the rate on the date of the breach, not the date of judgement. Additionally, the retainer or stand-by fee component does not enjoy maritime lien status. Finally, although the crew left the ship on 21 September 2014, their wage claims are to be calculated pursuant to the terms of their contracts which give additional payment.

The City of Sorel claims for berthage ($75,000) and for the supply of electricity ($22,000). It argues it is entitled to priority under s. 122 of the *Canada Marine Act* or s. 139 of the *Marine Liability Act* or, alternatively, on an equitable basis. Section 122 of the *Canada Marine Act* gives priority to a Port Authority or to "a person who has entered into agreement under s. 80(5)". The City of Sorel is not a Port Authority and is not "a person who has entered into agreement under s. 80(5)" since s. 80(5) relates to parts of the Saint Lawrence Seaway and Sorel is not within the Seaway. Sorel therefore has no priority under s. 122 of the *Canada Marine Act*. Neither does the city's claim fall under s. 139 of the *Marine Liability Act*. The claim of the city is not for "goods, materials or services" supplied to a vessel. This follows from the distinction in s. 22 of the *Federal Courts Act*[22] between necessaries and docking charges and from the purpose of s. 139 of the *Marine Liability Act* which was to give Canadian necessaries suppliers a priority equal to that enjoyed by foreign suppliers. In the traditional ranking, the claims of the City of Sorel should, therefore, have no priority. However, the court does have an equitable jurisdiction to vary the traditional ranking if the interests of justice so require. It is appropriate to alter the traditional ranking in respect of the claim for the supply of electricity to the ship since this did benefit all of the creditors. The claim for the costs of electricity will rank immediately after the claims of the Master and crew.

The claims of necessaries suppliers with lien claims under s. 139 of the *Marine Liability Act* rank after the claim of the City of Sorel for the supply of electricity.

One of the claimants, Skylane, claims a Panamanian mortgage over the vessel in the amount of $1.7 million. This court previously ordered that it file evidence as to the validity of its Panamanian mortgage and it failed to do so. The claim of Skylane is struck for failure to comply with this order. In addition, the claim of Skylane would have been defeated because: the only evidence before the court is an affidavit to the effect the Skylane mortgage is invalid under Panamanian law; and, the Skylane mortgage was granted while the ship was under arrest. A

[22] RSC 1985 c. F-7

shipowner cannot deal with a ship under arrest in such a way as to dissipate its value to other creditors.

Another creditor claimed to be a crew member and entitled to priority for unpaid wages of $50,000. This creditor was not, in fact, a crew member. He was an employee and shore labour and does not benefit from any priority.

Mr. Hamilton claims a priority for various amounts advanced to the purchaser to pay crew, service providers, ship chandlers and other vessel maintenance expenses. However, the evidence establishes Mr. Hamilton was in a joint venture with the purchaser and was not a lender. As a joint venturer he is only entitled to whatever funds are left over after all other creditors are paid.

The claim of Ballantrae as mortgagee is challenged on the grounds that its mortgage was not registered. Hamilton argues that as an unregistered mortgage it is an equitable mortgage which ranks just above ordinary *in rem* creditors. It is not correct that an unregistered mortgage is necessarily an equitable mortgage. An unregistered legal mortgage would have difficulty ranking ahead of a subsequently registered mortgage but outranks equitable charges and *in rem* creditors.

The registration of the Ballantrae mortgage under the Ontario PPSA also raises issues. Ballantrae argues this gives the mortgage priority over ordinary *in rem* creditors whereas Hamilton argues the registration under the PPSA is not relevant. Specifically, Hamilton says the PPSA registration is not relevant because, first, the vessel was never in Ontario and, second, the PPSA cannot constitutionally apply to maritime matters. It is correct that the PPSA does not apply as the vessel was not in Ontario and this is sufficient to dispose of this issue. However, the point of the general application of the PPSA to maritime matters is of such importance that it deserves comment. Recent jurisprudence indicates that the scope for the “incidental” application of provincial statutes in a maritime context is much broader than was thought. This court may “take cognizance of the Ontario PPSA”.

Finally, with respect to interest on the claims, prejudgment interest is in the discretion of the court. In the circumstances, it is appropriate that no prejudgment interest be awarded.

Comment: The statement that maritime liens and liens created by statute have the same status may be questionable as a rigid rule. It will depend in each case on the precise wording of the statute in issue. Also, the court’s treatment of the Ontario PPSA is notable but raises a question of what happens when the priorities established by the PPSA differ from those that arise under Canadian maritime law.

9. Verreault Navigation Inc. v. 662901 N.B. Ltd.[23]

Ranking of Priorities - Sister Ship Claims - Interest – SSOPF

Précis: This matter concerned the ranking of various claimants to proceeds from the sale of a

[23] 2016 FC 1281

ship.

Facts: The barge "Chaulk Lifter" was arrested by a harbour authority for non- payment of harbour dues. At the time of her arrest she was in the possession of a ship repairer for the purposes of having repair work done. The ship repairer subsequently commenced this proceeding for amounts owing and obtained an order for the sale of the vessel. The barge was sold by court order for $600,000. From the proceeds of sale, the expenses of the Marshall were paid as were two preferred claims under the *Canada Marine Act*[24] for harbour dues and damage done to a dock. After the payment of these claims there was a balance of approximately $460,000 but the total claims against the vessels exceeded $6.5 million. The claimants and their claims were:

- The ship repairer for the costs of repairs to the barge, the costs of bringing the barge to sale and for various *custodia legis* expenses;
- The harbour authority for a mortgage claim of $57,000, which mortgage was granted on 20 August 2014 to secure partial payment of harbour dues owing in respect of the barge;
- The harbour authority for $260,000 in wharfage, clean-up and wreck removal, all of which were incurred as a consequence of the sinking of a sister ship;
- The brother and father of the sole officer and director of the owner for a mortgage claim of $407,000;
- The Canadian Coast Guard for $1.8 million representing the costs of cleaning up an oil spill that occurred as a consequence of the sinking of the sister ship;
- The Administrator of the Ship-source Oil Pollution Fund for security to satisfy claims anticipated to be filed as a consequence of the sinking of the sister ship; and
- A lender for funds advanced.

Decision: The balance of the sales proceeds are to be distributed in priority first to the ship repairer then to the harbour authority, in respect of its mortgage claim, with the balance then to be shared pro-rata between the allowed claims of the ordinary *in rem* creditors. Interest is to be allowed only to the extent earned on the sums on deposit and is to be shared *pro rata*.

Held: The ship repairer has a possessory lien which outranks the two mortgages that pre-date the commencement of its work on the vessel. The possessory lien covers the work done to the barge, the costs of moving the barge from time to time and the costs of fuel and supplies but not GST and PST for which the repairer was entitled to a rebate. In addition, its claim is reduced by $23,000 for damage caused to the dock while moving the barge and which formed part of the preferred claim under the *Canada Marine Act*.

The harbour authority claims $57,000 in respect of the mortgage it holds on the barge and

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[24] SC 1998, c. 10

$260,000 in respect of a sister ship claim. It is entitled to priority for its mortgage claim but not in respect of the amounts incurred in relation to the sister ship or as a consequence of the sinking of the sister ship. A sister ship claim is a mere claim *in rem* with no priority and ranks *pari passu* with other ordinary creditors.

The claims of the brother and father for priority as mortgagees are disallowed. The evidence establishes that the corporate owner of the barge was given no consideration for the mortgage. Moreover, the transactions were not at arms length and the court has inherent power to vary the normal ranking of priorities. If they have any claim, it ranks after the claims of ordinary creditors.

The claim of the Canadian Coast Guard in respect of the costs of clean-up of the oil spill associated with the sinking of the sister ship, being a sister ship claim, ranks *pari passu* with ordinary creditors.

The claim by the Administrator of the Ship-source Oil Pollution Fund for security is challenged on the basis that s. 102 of the *Marine Liability Act*[25] gives no right to claim against sister ships. However, neither does the *Marine Liability Act* contain anything that detracts from the general right under s. 43(8) of the *Federal Courts Act*[26] to claim against a sister-ship. Accordingly, the Administrator has a right to claim against a sister ship but its claim will rank *pari passu* with other ordinary creditors.

The claim by the lender is disallowed as the funds advanced were not in respect of the barge or a sister ship of the barge.

10. Banford v. Mitchelson[27]

Personal Injury - Small Vessel Collision – Evidence - Effect of Guilty Plea in Criminal Proceedings – Adverse Inference

Précis: The operator of a vessel involved in a collision is not precluded from denying liability where a guilty plea in criminal proceedings was entered for economic reasons.

Facts: The plaintiff was a passenger in a small pleasure craft. She suffered personal injuries when a second pleasure craft collided with the boat in which she was riding. The collision occurred at night. The operator of the second boat was charged with dangerous operation of a vessel and pleaded guilty to the charge. In his defence to this civil action, the operator of the second boat denied he was involved in the collision.

Decision: Judgment for the plaintiff.

Held: The defendant has testified that he pleaded guilty to the criminal charge to avoid having to take additional time off work to defend the charge. In these circumstances, the defendant's guilty plea is not determinative of civil liability. Nevertheless, based on the testimony of the

[25] SC 2001, c. 6
[26] RSC 1985 c. F-7
[27] 2016 SKQB 328

witnesses, it is more likely than not that the defendant was the operator of the second boat and is liable for the injuries suffered by the plaintiff. The defendant's failure to call his spouse, who was with him in his boat on the night of the accident, as a witness justifies the drawing of an adverse inference.

11. Holman v. Oberg[28]

Small Vessel Collision - Stationary Vessel Unlit - Liability of Owner

Précis: The owner of a vessel is not vicariously liable for the negligence of the operator absent actual fault or privity.

Facts: The plaintiff, a 28 year old man, took a pontoon boat owned by his parents out onto a lake at night to go for a swim. While on the lake but while drifting the pontoon boat was hit by a boat owned by the first defendant and operated by the second defendant. The plaintiff was injured in the collision. At the time, the lights of the pontoon boat were not working, to the knowledge of the plaintiff but not to the knowledge of his parents. The plaintiff commenced this proceeding against the two defendants. The defendants then commenced a third party claim against the parents, the owners of the pontoon boat. This was an application for summary judgment on the third party claim.

Decision: The third party claim is dismissed.

Held: Although the evidence is somewhat unclear, it is assumed that the pontoon boat did not meet the lighting requirements of the *Canada Shipping Act, 2001*[29] and that the collision occurred in full darkness. Notwithstanding these assumptions, the parents did not know the navigation lights were not working and there was "no actual fault or privity" on their part. There is no vicarious liability under maritime law in the absence of actual fault or privity on the part of the owner.

12. Turcotte v. Dufour[30]

Collisions - Pleasure Craft

Précis: Where two vessels were proceeding on parallel courses at speed and one vessel suddenly veers sharply putting itself in front of the other, the turning vessel is 100% liable for the resulting collision.

[28] 2016 ABQB 448
[29] SC 2001, c. 26
[30] 2015 QCCA 1914

Facts: On 23 August 2008, a vessel operated by the appellant was involved in a collision with another pleasure craft. The two vessels were traveling at about 40 miles per hour in the same direction in a channel having a width of 150 to 200 metres with little traffic. The trial Judge found that the appellant swerved in front of the second vessel spraying the operator of the other vessel with water and then stopped. The second vessel was not able to stop in time to avoid a collision. The trial Judge found that the appellant was 100% at fault for the collision. The appellant appealed.

Decision: Appeal dismissed.

Held: The evidence was sufficient to enable the trial Judge to find that the sole cause of the collision was the sudden and unpredictable manoeuvre of the appellant.

13. Northern Transportation Company Limited (Re)[31]

Charter Parties – Default – Forfeiture

Précis: Failure to make charter payments was an event of default for which, in the circumstances, there was no right to reinstatement or relief from forfeiture.

Facts: In October 2013 NTCL and ITB entered into an agreement (the "Purchase Agreement") pursuant to which NTCL was to purchase from ITB 19 vessels and related assets for $12.9 million. The agreement provided for a closing date of 31 May 2018. Contemporaneously, the parties entered into a Charter Party and Equipment Lease Agreement (the "Lease Agreement") pursuant to which ITB chartered/leased the vessels to NTCL pending the closing of the Purchase Agreement. The Lease Agreement provided for monthly charter/lease payments to be made by NTCL which were eventually to be applied towards the purchase price under the Purchase Agreement. NTCL failed to make the lease payments due in February and March 2016. On 8 April 2016 ITB gave notice that it considered the failure to make the payments an event of default, the effect of which was to make the purchase subject to an earlier closing date. NTCL responded by attempting to make the delayed payments but ITB refused to accept them. Pursuant to the provisions of the two agreements, the parties then entered into a 30-day dispute resolution period. Before that period concluded, NTCL applied for protection under the *Companies' Creditors Arrangement Act*[32]. NTCL then made this application in the CCAA proceedings for orders, *inter alia*, that it was not in default of the Lease Agreement or, alternatively, that the Lease Agreement be reinstated or, in the further alternative, for relief from forfeiture.

Decision: Application dismissed.

Held: The Lease Agreement defined an event of default as including failure to make punctual monthly payments. It further provided that NTCL would have 10 days to rectify such failure if the failure was "due to oversight, negligence, errors or omissions". NTCL argues that this 10-day grace period applied and that it made the payments within the 10 day period. However, the non-payment of the two lease payments was intentional and does not come within "oversight,

[31] 2016 ABQB 522
[32] RSC 1985, c C-36

negligence, errors or omissions". NTCL alternatively argues that the Alberta *Personal Property Security Act*[33] permits a debtor to reinstate a lease by making up the overdue payments. This is the effect of the Alberta Act but the Lease Agreement provides that it is governed by British Columbia law and the British Columbia *Personal Property Security Act*[34] provides no such remedy for a corporate debtor. Finally, NTCL requests relief from forfeiture but there is no forfeiture in this case. ITB has not elected to repossess the vessels but has instead elected for an early closing date. As there is no forfeiture, the court cannot grant relief against it.

14. Avina v. The Ship Sea Senor[35]

B.C. Admiralty Rules – Arrest – Sale Pendente Lite – Shareholder's Dispute – Application of PPSA

Précis: The B.C. Supreme Court refused to set aside an arrest but also refused to order the sale of a vessel under arrest *pendente lite*.

Facts: The plaintiff and defendant purchased a vessel together through a company incorporated by the defendant and of which the defendant was the sole director. Differences arose between the parties leading to the plaintiff's commencement of this action and the arrest of the vessel. The plaintiff brought this application to sell the vessel *pendente lite*. The defendant opposed and brought its own application to set aside the arrest.

Decision: Both motions are dismissed.

Held: With respect to the plaintiff's motion to sell the vessel *pendente lite*, the plaintiff argues that the vessel is deteriorating and a sale is necessary to halt the deterioration in value. However, the defendant's evidence is that the vessel is not seriously deteriorating and this evidence is more convincing. Further, the value of the plaintiff's claim is modest relative to the value of the vessel and it appears the defendant has an arguable defence. In the circumstances, an order for sale is not necessary or expedient.

The defendant argues that the arrest of the vessel should be set aside on the grounds that the dispute between the parties is a shareholder's dispute and that there is no basis for the exercise of the court's maritime law jurisdiction. However, Rule 21-2 of the *Supreme Court Civil Rules*[36] provides that an action *in rem* may be brought whenever permitted in the Federal Court of Canada. The claim is "with respect to title, possession or ownership of a ship or any part interest therein" within the meaning of s.22(2)(a) of the *Federal Courts Act*[37]. The claim could have been brought *in rem* in the Federal Court and is a claim for relief under or by virtue of Canadian maritime law. This is sufficient to dismiss the defendant's application.

[33] RSA 2000, c. P-7
[34] RSBC 1996, c. 359
[35] 2016 BCSC 749
[36] BC Reg. 168/2009
[37] RSC 1985, c. F-7

15. *Avina v The Sea Senor*[38]

Purchase of Vessel – Whether a secured transaction – Entitlement to Foreclosure

Précis: The purchase of a vessel through the medium of a company accompanied by a loan to purchase shares in the company is not a secured transaction entitling foreclosure against the purchased vessel.

Facts: The plaintiff and defendant agreed to purchase the "Sea Senor", a 34-foot trawler. The vessel was put in the name of a company the shares of which were owned 51% by the defendant and 49% by the plaintiff. The parties agreed that operating expenses were to be apportioned by a similar ratio of 51%/49%. The defendant loaned to the plaintiff the funds for his share of the purchase price on terms that it be repaid over time at 5% interest. As security for this loan, the plaintiff endorsed and delivered to the defendant 50,000 shares, worth about $46,000, in an unrelated company. A dispute arose over the repayment of the loan and allocation of the expenses which resulted in the plaintiff commencing this proceeding and arresting the vessel. The defendant then gave notice of foreclose on the vessel under s. 61 of the *Personal Property Security Act*[39] and also filed a counter-claim alleging the plaintiff defaulted on the loan and owed operating expenses.

Decision: Judgment to the defendant for the amounts owing but the claim for foreclosure is dismissed.

Held: The defendant says: that in substance the transaction as a whole was a secured transaction with the vessel as security; that the voluntary foreclosure provisions of s. 61 of the *Personal Property Security Act* applied to the vessel as security; and, that the plaintiff's interest in the vessel is now foreclosed with the result that the vessels is now owned by the company free and clear of any interest of the plaintiff. However, the only secured aspect of the transaction was the loan which was secured by the shares. There was no security interest in the vessel which belongs to the company of which the parties hold the shares. The plaintiff is, however, in default under the loan agreement and owes the defendant.

16. *Mckeil Marine Limited v. Canada*[40]

Coasting Trade - Standing to Challenge Transport Canada Decision – Mootness

Précis: An appeal from a decision of Transport Canada that the towing of two decommissioned vessels from British Columbia to Nova Scotia via the Panama Canal was not "coasting trade" was dismissed on the grounds the applicant did not have standing and the issue was moot.

Facts: The applicant was a Canadian tug and barge company. It wrote to Transport Canada requesting whether the towing of two decommissioned Canadian warships from British Columbia to Nova Scotia via the Panama Canal was "coasting trade" within the meaning of the *Coasting Trade Act*[41]. Its concern was that the towage of the two decommissioned warships

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[38] 2016 BCSC 2488
[39] RSBC 1996, c. 359
[40] 2016 FC 1063
[41] SC 1992, c. 31

was to be done by an American tug company and that a license had not been obtained. Transport Canada responded that, in its view, the towage would not constitute "coasting trade" and no license was required. Thereafter, the towage was in fact performed by the American company. The applicant then brought this application before the Federal Court for a declaration that the towage did constitute "coasting trade".

Decision: The application is dismissed.

Held: The applicant does not have direct standing to bring this application as it is not "directly affected" in the sense that the matter at issue affects its legal rights, imposes legal obligations on it, or prejudicially affects it in some manner. The applicant's concern that the decision of Transport Canada has a negative precedential affect is speculative. The applicant further does not have "public interest" standing. Public interest standing arises where the case raises a serious justiciable issue, the party has a real stake or a genuine interest in its outcome and the proposed suit/proceeding is a reasonable and effective means to bring the case to court. Here there is a serious justiciable issue and the applicant has a real stake or genuine interest in the outcome but this is not an appropriate case to grant public interest standing. Even if the applicant had standing, the matter is moot as the towage of the warships has already been completed and a case with these particular facts is not likely to reoccur.

17. C.H. Robinson Worldwide v. Northbridge Insurance[42]

Direct Action Against Motor Carrier Insurer – Misrepresentation – Policy Not Void

Précis: The Ontario Court of Appeal overturned a trial judgement holding that a misrepresentation by an insured voided the policy of insurance and was a defence to a direct action against the insurer pursuant to s. 132(1) of the *Insurance Act*[43] of Ontario.

Facts: The appellant, a freight forwarder, retained the services of a motor carrier, KLM, to transport a shipment of food products. The contract between the freight forwarder and KLM provided that KLM would be liable for the value of any shipments tendered to it and also required KLM to maintain insurance coverage. KLM applied for and obtained coverage from the respondent insurer. The insurance application contained a question as to whether there were any contracts with shippers that stipulated higher limits of liability than were contained in the KLM's standard bill of lading. KLM answered this question in the negative. During the course of transit, the truck was involved in an accident and the food products were destroyed. The freight forwarder commenced proceedings against KLM and provided the insurer with notice of the claim. Default judgment was subsequently obtained against KLM. The freight forwarder then brought this proceeding against the insurer pursuant to s. 132(1) of the *Insurance Act* of Ontario, which provides for direct action against insurers. The insurer defended arguing that the policy was void for misrepresentation.

At first instance the motions Judge held that the contract between KLM and the freight forwarder expanded the liability of KLM beyond the $4.41 per kilogram maximum liability provided for under the Uniform Conditions of Carriage and ought to have been disclosed by

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[42] 2016 ONCA 364
[43] RSO 1990, c. I.8

KLM to the insurer. The failure to disclose rendered the insurance contract void. The freight forwarder appealed.

Decision: Appeal allowed and judgment is granted against the insurer.

Held: An insurer has the onus of proving a material misrepresentation. This onus has not been met in this case. The question asked by the insurer was "Does the applicant have any contracts with shippers that stipulate limits of liability that are required to supercede the applicant's standard Bill of Lading?". This question references KLM's standard bill of lading, not the Uniform Conditions of Carriage. KLM's standard bill of lading, if one exists, is not part of the evidence and, accordingly, it cannot be said that answering the question in the negative was a misrepresentation.

Comment: Although not a maritime law matter, this case raises the possibility that provincial insurance statutes providing direct action against insurers might apply in maritime matters. Such was the holding in *Langlois v. Great American Insurance Company*, 2015 QCCS 791.

18. Platypus Marine Inc. v. The Ship Tatu[44]

Criminal Interest Rate – Ship Repair

Précis: The court reduced interest to $35,000 from $100,000 on the basis that the rate charged was a criminal rate.

Facts: The plaintiff provided ship repair and maintenance services to the defendant vessel. The plaintiff had provided an estimate outlining the work to be done and the defendant accepted that estimate. The estimate included various terms, none of which referenced interest on overdue amounts. The plaintiff sent several invoices all of which were "DUE UPON RECEIPT" but which again, did not reference interest. The plaintiff led contradicted evidence of an oral agreement that interest of US$100,000 would be paid. The defendant brought this application for a determination that no interest was owed.

Decision: $35,000 in interest is owing.

Held: The interest alleged to be owing represents an interest rate in excess of 60% per annum and is therefore a criminal rate of interest under the *Criminal Code*[45]. In these circumstances, an appropriate interest rate is 5% per annum as provided by the *Interest Act*[46] which works out to $35,000.

[44] 2016 FC 501
[45] RSC 1985, c. C-46
[46] RSC 1985, c. I-15